147 U.S. 263

CASE No. 14,898.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 957.

JOHN A. NASH, APPELLANT,

vs.

GEORGE W. HARSHMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

RECORD FILED OCTOBER 14, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1893.

(Record, page 1.)

* * * * * * *

Court of Common Pleas, Logan County, Ohio.

GEORGE W. HARSHMAN, Plaintiff,
vs.
JOHN A. NASH, CHARLES E. DUPEE, and BESSIE B. DUPEE, His Wife; Warren and Gammer, a Partnership Doing Business in the State of Ohio, and The National Lafayette Bank, a Corporation Organized under the Laws of the United States, Defendants.

Petition.

The plaintiff, George W. Harshman, says that the defendant John A. Nash is indebted to him on a promissory note, of which the following is a copy, with all indorsements, to wit:

$26,000.00. BELLEFONTAINE, O., *March* 15, 1888.

"One year after date, for value received, I promise to pay to the order of George W. Harshman twenty-six thousand dollars, with interest at the rate of eight per cent. per annum until paid, and payable annually, and if any interest remain unpaid for thirty days after the same becomes due the holder of the note may, at his option, declare the principal thereof due and payable, with accumulated interest, and collect the same, and interest not paid when due shall bear eight per cent. thereafter until paid.

JOHN A. NASH."

There were no endorsements on said note. Plaintiff is the legal owner and holder thereof, and there is now due him thereon from said defendant the sum of twenty-eight thousand and eighty dollars, with interest thereon at the rate of eight per cent. per annum from the 15th day of March, 1889, which he claims with interest. Plaintiff says, further, that in order to secure the payment of the said note and the sum of money therein stipulated to be paid said defendant at the same time of the execution and delivery of said note, to wit, the day thereof shown above, executed and delivered to plaintiff his mortgage deed, being a deed of general warranty, but containing the condition hereinafter expressed, whereby he conveyed to plaintiff the following-described real estate situate in Logan county and in the State of Ohio and bounded and described as follows, viz:

* * * * * * *

The said deed from said defendant to plaintiff had a condition thereon written in substance that if said defendant John A. Nash should pay the said sum of $26.00 and the interest thereon as stipulated in said note above set forth and copied in all respects according to the provisions and stipulations of said note, then in that case the said deed should be void; and the said deed on the 16th day of

March, 1888, was filed by said plaintiff with the recorder of said county for record at fifteen minutes past eight o'clock a. m. of said day and was thereafter duly recorded by said recorder in Mortgage Record No. 5, page- 445, 446, and 447, of said county.

Plaintiff says further that no part of the principal or interest of the said note has been paid nor has any payment ever been made thereon by defendant John A. Nash or any one, but that the whole amount thereof is still due him from said defendant, amounting, according to the terms and stipulations of said note and said mortgage, to the sum of $28,080.00, with interest from the 15th day of March, 1889; that by the non-payment of the said note at the maturity thereof the condition of the said mortgage deed was broken and the same then became and still is absolute. Upon the 16th day of March, 1888, defendant John A. Nash conveyed away the said lands above described to defendant Charles A. Dupee, who still holds the legal title to the same, and the defendant Bessie B. Dupee is the wife of defendant Chas. A. Dupee. The defendants Warren and Gammer are a partnership firm organized under the laws of Ohio and doing business therein, and the defendant The National Lafayette Bank is a corporation organized under the laws of the United States, and the said partnership and the said corporation each have or claim some interest in or lien upon the above-described real estate, the nature and extent of which plaintiff is unable to state, but ask that they may be required to set up.

Wherefore plaintiff prays judgment against defendant John A. Nash for the said sum of $28,080, with interest thereon at the rate of 8% per annum from the 15th day of March, 1889; that the real estate herein described may be sold for the satisfaction of his claim herein set forth; that an order may issue to the sheriff of said county commanding him to sell the said premises as on execution and bring the proceeds into court for distribution; that the defendants Warren & Gammer and National Lafayette Bank may be required to set up their respective claims, if they have any, or be forever barred therefrom, the priorities of liens may be determined by the court, the equity of redemption of defendant Charles A. Dupee be forever foreclosed, and the dower of defendant Bessie B. Dupee forever barred in said premises; that plaintiff's claim herein set forth may be paid out of the proceeds of such sale, and for such other and further relief as equity and the nature of the case may require.

GEORGE W. HARSHMAN,
By LOUIS D. JOHNSON,
His Attorney.

THE STATE OF OHIO, } ss:
Logan County, }

Lewis D. Johnson, being first duly sworn, says that he is the attorney of plaintiff in the action duly authorized and empowered to bring the same and act thereon for plaintiff in all respects and to the full extent that plaintiff himself might personally do; that plaintiff is a non-resident of the said county of Logan and is now

absent therefrom, and that all of the allegations and statements of the foregoing petition are true, as affiant verily believes.

LOUIS D. JOHNSON.

Sworn to before me by the said Louis D. Johnson and by him subscribed in my presence this 24th day of August, 1889.

J. A. McILVAINE,
Deputy Clerk.

* * * * * * *

(Record, page 17.)

Court of Common Pleas of Logan County, Ohio.

GEORGE W. HARSHMAN, Plaintiff,
vs.
JOHN A. NASH *et al.*, Defendants. } No. 3962.

Defendants' Answer.

For answer to the petition herein the defendant Charles A. Dupee says that he denies each and every allegation of said petition except as hereinafter stated in his second defense; and for a second defense to the cause of action set up against him in the petition this defendant here adopts all and singular the statements and matters contained in his first defense herein and makes them part hereof as if the same were here again stated as matter of inducement, and he further adopts as a part hereof all and singular the matters set forth in the second defense of John A. Nash, contained in his answer to the petition in this cause.

CHARLES A. DUPEE.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

The affiant, Charles A. Dupee, says that the statements of the foregoing answer he believes to be true.

CHARLES A. DUPEE.

Subscribed and sworn to before me by the affiant, Charles A. Dupee, this 22nd day of October, 1889.

[SEAL.] ARTHUR A. BLISS,
Notary Public.

(Filed Oct. 26, 1889.)

* * * * * * *

(Record, page 17.)

Court of Common Pleas of Logan County, Ohio.

GEORGE W. HARSHMAN, Plaintiff,
vs.
JOHN A. NASH *et al.*, Defendants. } No. 3962.

Answer and Cross-petition.

For answer to the petition herein the defendant John A. Nash says that he denies each and every allegation, except as hereinafter stated in the second defense, and for a second defense to this cause of action set up against him in the petition the defendant adopts one and singular the statements contained in his first defense here and makes them part hereof, as if the same were here again stated as *under* of inducement, and says that on the 15th day of March, in the year 1888, the same being the day and year that the defendant *excepted* and delivered to the plaintiff the said note and mortgage in the petition mentioned, the defendant and the plaintiff made and entered into a written agreement relating to said lands in the mortgage mentioned and described, and also to the terms and conditions of the payments of said note mentioned in the petition; which said agreement was one of the several instruments in writing made and entered into on the said 15 day of March, 1888, aforesaid, the other terms being the said note and mortgage aforesaid, and all of said instruments in writing taken together are but parts of one and the same transaction relating to the payment of said note and the sales of said land mentioned and described in the mortgage, and the defendant says *are* this said agreement in writing so made and entered into by him and the plaintiff as above stated it was agreed between them that the said defendant should have four years within which to pay the money due on said note, and that the defendant should have power and authority to sell the said lands in the petition and mortgage mentioned in parcels to suit the convenience of purchasers on one, two, and three years time, paying to the plaintiff all moneys so received from the proceeds of the sale of said lands until the said note and mortgage in the plaintiff's petition mentioned were paid off at any time within said four years at the option of the defendant; and it was further agreed by the plaintiff and defendant at the time of the making, signing, and delivery of the said several instruments in writing that the defendant should have a duplicate copy of the said agreement relating to the sale of said lands and the terms and conditions of the payment of said note, and that on the delivery of this last-mentioned agreement to the plaintiff it was with the express agreement and understanding that the plaintiff would furnish the defendant with a duplicate copy thereof, which was a part of the said agreement, and he further says that said agreement was most favorable to the defendant and without it purchasers could not and cannot be induced to buy the said lands from the defendant, and that the defendant on several occasions went to the plaintiff's residence, near Dayton, Ohio, and requested

and demanded of said plaintiff a duplicate copy of said agreement, which the said plaintiff wholly refused and still refuses to deliver to the defendant, and that there now are and have been parties who were and are willing and anxious to buy said lands on the terms and conditions of said agreement, and that the lands embraced in said mortgage are worth at least $40,000.00, and by reason of the plaintiff's refusal to comply with said agreement and deliver to the defendant a duplicate copy of said agreement he has lost all opportunity of selling said lands up to this date, and that without the benefit of said agreement it would be impossible to make the sales of said lands without the defendant sustaining a loss of fifteen thousand dollars ($15,000.00). He makes this answer a cross-petition and counterclaim against the plaintiff and prays either that the plaintiff be required specifically to perform his agreement or in the alternative that the defendant have judgment against the plaintiff for fifteen thousand dollars damages and for all general relief.

D. S. HOUNSHELL,
Att'y for Defendants.

STATE OF ILLINOIS, } ss:
Cook County, }

The affiant, John A. Nash, says that the statements of the above answer and cross-petition *to be* true.

JOHN A. NASH.

Subscribed and sworn to before me by the affiant, John A. Nash, this 23 day of October, 1889.

[SEAL.] BENJAMIN J. SAMUELS,
Notary Public.

* * * * * * *

(Record, page 21.)

Reply.

Court of Common Pleas of Logan County, Ohio.

GEORGE W. HARSHMAN }
vs.
JOHN A. NASH *et al.* }

And now comes the plaintiff and for reply to the second defense of the answer of the defendant John A. Nash and to the second defense of the answer of defendant Charles A. Dupee denies each and every allegation in said second defense and prays as in his petition.

By LOUIS D. JOHNSON.

STATE OF OHIO, } ss:
County of Champaign, }

L. D. Johnson, being duly sworn, says that he is the attorney of plaintiff in this action; that plaintiff is a non-resident of said

county of Champaign and a non-resident of the county of Logan and now absent from both said counties, and that the allegations of the foregoing reply are true, as affiant verily believes.

LOUIS D. JOHNSON.

Sworn to and subscribed before me by the said L. D. Johnson this 15th day of November, 1889.

JAMES ——,
Notary Public. [SEAL.]

(Filed Nov. 26, 1889.)

* * * * * * *

(Record, page 61.)

Afterwards, to wit, on the 4th day of October, A. D. 1890, there was filed in the clerk's office of said court in the above-entitled cause the opinion of Hon. A. J. Ricks; which reads and is as follows, to wit:

Circuit Court of the United States, Northern District of Ohio, Western Division.

GEORGE W. HARSHMAN
vs.
JOHN A. NASH, CHAS. A. DUPEE, *et al.*

Opinion of the Court.

This case was instituted in the court of common pleas of Logan county by the plaintiff and removed by the defendant to this court under the local-prejudice provision of the statute. On the 15th day of March, 1888, the defendant John A. Nash made and executed his promissory note to the plaintiff for the sum of $26,000.00, payable in one year after date, with interest at the rate of eight per cent. per annum, payable annually. On the same day, to secure the payment of said note, he executed a mortgage on some six hundred acres of land situated in Logan county, Ohio. The defendant having failed to pay the interest due on said note at the expiration of the first year and for some time thereafter, the plaintiff instituted his suit in the court of common pleas for said county, setting forth the facts as above stated and asking for a personal judgment for the sum of $26,000.00 and interest thereon and for a sale of the mortgaged premises. The defendant filed his answer to the petition in the State court, admitting the making and delivery of the note and the mortgage as described in the petition, but claiming that contemporaneous with the making of said note and mortgage a second written instrument was made between the parties by which the time for the payment of said note was extended for a period of four years and the right given to the defendant John A. Nash to make sale of parcels of the land mortgaged upon the payment of one-fourth in cash and notes payable in one, two, three,

and four years, at prices to be satisfactory to the plaintiff, and *and* that the plaintiff agreed to accept the money and notes so received and apply the same as credits upon the note aforesaid; that said agreement was signed on the 15th day of March, 1888, and delivered to the plaintiff upon his promise to make a duplicate of the same and send it to the defendant John A. Nash. After filing this answer and other pleadings, which put the case fully at issue under the practice in the State court, the defendant filed an affidavit under the local-prejudice act and removed the case to this court.

By agreement of the parties the case was heard in the city of Cleveland, in the eastern division of said district, with the understanding that under whatever decision was made a decree might be drafted and entered upon the journal at Toledo as of the last day of the court of the present term. The defendant at the outset contended that this case could not proceed upon the pleadings as they stood at the time of the removal from the State court, but that an order should be made remodeling the pleadings in conformity to the rules of practice in equity, as this case properly belongs on the equity side of this court. I have examined the pleadings and find that the petitions contains all the substantial averments necessary for a bill in equity seeking the foreclosure of a mortgage. It is true that the petition asks for a personal judgment; but this part of the petition can be ignored and the equitable relief to which the plaintiff is clearly entitled under his bill can be administered without subjecting the parties to the delay and expense of remodeling these pleadings. The answer filed by the defendant is as full and complete as would be an answer in equity, and he shall have the benefit of all the defenses to which he would be entitled if the pleadings were remodeled as prayed for.

I have examined very carefully all the testimony in this case and am thoroughly satisfied that a fair preponderance of it sustains the claims of the plaintiff, and that he is entitled to the relief asked in his petition. It seems very clear from the testimony that the parties met at Bellefontaine on the 15th day of March, 1888, for the purpose of executing this note and mortgage and finally completing the contract and arrangement entered into between the parties before that time. The transaction would then have been fully closed but for the failure of Mr. Thompson to appear and deliver the deed to the property, the title to which was at the time vested in the Commercial Bank of Cincinnati. There were present on that day all of the parties to this transaction or who have testified in this case as to what took place at that time except Mr. Thompson. His failure to appear made it impossible for the defendant to deliver the mortgage to the plaintiff, but the note was then executed and signed and the mortgage executed, to be delivered on the following day, so soon as the title passed from the Commercial bank to Nash. There is no claim that on the 15th day of March, when the parties were all assembled ready to complete this transaction, any collateral contract in writing was prepared or ready for signature; that contract was not drawn until the night of the 15th, after the parties had dis-

persed. It was evidently, therefore, not a part of the original contract and understanding contemplated by the parties.

Harshman, Sayre, Markly, and Sweet all concur in the statement that they saw no such collateral written contract. Markley says that some collateral contract was written and signed on the 16th, but that it was but four or five lines long; that it provided only that in case the interest was promptly paid annually the payment of the note would be extended, and claims that that paper was delivered to Nash, and that Harshman did not receive the original or a copy even. If Markley is right about such paper having been prepared and signed it is evidently not the paper referred to in the defendant's answer. The weight of testimony, therefore, I think is clear that no written collateral agreement such as the defendant claims in his answer was ever signed by Harshman or agreed to by him. There is abundant proof to show such instrument was prepared, but not as to the signing. But it is established that Harshman agreed orally that if the interest on this note was paid annually and promptly and taxes were paid the payment of the principal might be deferred rather indefinitely. Admitting that such a verbal contract was made and was a part of the original contract, it has been broken by the defendant's failure to pay the interest as agreed. It is claimed that the note bears upon its face evidence that the principal was not expected to be paid in a year, because it provides the payment of interest annually, and upon failure to pay after thirty days the principal should be declared due. Such a note would not be inconsistent with the verbal understanding which Harshman admits existed and which, if conceded, has been broken by the defendant's failure to comply therewith.

But the defendant is not in position to insist upon the equitable relief claimed in his answer. On the very day this mortgage was executed the defendant conveyed by deed of warranty whatever title was left in him to his codefendant Dupee. He thereby placed it beyond his power to negotiate sales of any portion of this tract of land without authority from Dupee as well as from Harshman. It is not claimed in the answer and not shown in the evidence that any such authority from Dupee was given the defendant. Without such authority from Dupee he could not have made sales even if he had a duplicate of the alleged contract made at the time claimed in the answer.

The defendant has failed in another respect. He has not averred in his answer and has not shown by testimony that he ever in fact negotiated a specifically described or identified sale of any portion of these premises, or that he was deprived of making any such sale because he did not have the duplicate contract referred to. The contention of the defendants' counsel that it was well understood between the parties that the only means available by which Nash could meet the principal or interest on this note was from the sale of the mortgaged premises, and that it was not reasonable to expect that such sales could be made in a year, is not sustained by any evidence. It was not unreasonable in the plaintiff to expect that Nash would be able to realize enough from a rich farm of six

hundred acres to pay the annual interest on this note, and if he had done so this suit would not in all probability now be pending. It is significant that the defendant Dupee, neither in his letters to the plaintiff nor in his answer makes any such claim as is insisted upon by the defendant Nash. He does not seem to have understood that there was any equitable defense to this suit, but in his letter asked for indulgence solely on the ground of policy and favor to the defendant Nash, to enable him, if possible, to make sale of the property. I cannot, therefore, find any reasons for sustaining the defendant's claims in this case. I think the plaintiff is entitled to a speedy sale of this property and to have the proceeds applied to the satisfaction of his note and interest. A decree may be prepared accordingly.

AUGUSTUS J. RICKS,
Dist. Judge.

* * * * * * *

(Record, page 66.)

Afterwards, to wit, at the December term of said court, in the year of our Lord 1890, to wit, on the 4th day of December, A. D. 1890—present, the Honorable Augustus J. Ricks, district judge—a decree was made and entered in said cause; which said decree reads and is as follows, to wit:

GEORGE W. HARSHMAN
vs.
JOHN A. NASH *et al.*

This day came the parties, by their counsel; and thereupon this cause came on for hearing upon the pleadings, testimony, and exhibits thereto, and was argued by counsel and submitted to the court; and the court, having fully considered the same and being fully advised in the premises, do find that the equities of the case are with the said complainant and that he is entitled to the relief prayed for; and the court further finds that the said John A. Nash on the 15th day of March, 1888, executed and delivered to the said complainant, George W. Harshman, his certain promissory note for the sum of $26,000.00, bearing interest at the rate of 8% per annum, payable annually, which said note was secured by mortgage as in the bill described and upon the premises therein described, and that said mortgage deed was duly delivered to the recorder of Logan county for record, and that the same was thereupon duly recorded in the records of said county and is a valid and prior lien on the lands and tenements in said bill described; and it further appeared to the court that on the 16th day of March, 1888, the said John A. Nash made and delivered to the defendant Charles A. Dupee his warranty deed for the premises above referred to, and that said Dupee at the time of said deed had full knowledge of the force and effect of the mortgage executed by Nash to the complainant; that said transfer to Dupee was made with full

knowledge of all the equities and rights of the complainant as averred in the bill, and that there is due to the said complainant, George W. Harshman, from the said defendants, on the claim set up in the said bill and upon the note and mortgage in the bill described, the sum of $32,046.71, with interest at the rate of 8 % per annum from the first day of this term, to wit, the 2nd day of December, 1890. Inasmuch as the note bears and calls for interest at the rate of 8 % per annum, the said gross sum above named shall bear interest at the rate of 8 % per annum until paid, and that the sum of $32,046.71, with interest as aforesaid, is a valid and prior lien on the lands and tenements in said bill described from the 15th day of March, 1888, and is the first and best lien thereon; and the court further find that the conditions of said mortgage deed are broken, and that the said complainant is thereby entitled to have the defendants' equity of redemption foreclosed. It is therefore ordered, adjudged, and decreed that the said John A. Nash within ten days from the entry of this decree pay to the said complainant, George W. Harshman, the said sum of $32,046.71, with interest from the 2nd day of December, 1890, at the rate of 8 % per annum, and to the clerk of this court the costs of this suit, to be taxed at $——, and in default thereof that the equity of redemption of the said defendants, John A. Nash and Charles A. Dupee, and the dower right of the defendant Bessie B. Dupee to the said mortgaged premises shall be forever barred and foreclosed, and said premises shall be sold free from all their rights and equities therein, and an order of sale shall issue to Benjamin F. Wade, United States marshal for the northern district of Ohio, who is hereby appointed special master commissioner to make said sale, and that said special master proceed to appraise, advertise, and sell, according to the law regulating the sale of lands upon judgments and executions at law, subject to the modifications thereof hereinafter provided, the lands and tenements in said mortgage and bill set out and described and report his proceedings to the court forthwith thereafter. It is ordered that the advertisement of said sale shall be made in some newspaper of general circulation in the northern district of Ohio, advertisement in a German newspaper dispensed with.

It is ordered that the sale of said premises shall be made at the door of the court-house in the village of Bellefontaine, Ohio, and shall be upon the following terms, to wit, one-third cash in hand on day of sale, one-third in one year, and one-third in two years from day of sale, the deferred payments to bear interest and be secured by mortgage upon the premises so sold. The lands and tenements in said mortgage and in said bill are described as follows, viz: Situate in the county of Logan and State of Ohio and within the western division of the northern district of said State, to wit:

* * * * * * *

And the court orders that said master shall cause said lands to be appraised in the parcels of the size and description appearing in the petition and in this decree, and that said lands shall be advertised and offered for sale in such parcels, and the whole of said lands shall in like manner be appraised, advertised, and

offered as a whole; and if the sale of the parcels shall in the aggregate amount exceed the amount of the sale in bulk, then such sale by parcels shall be deemed valid and the sale by bulk as not valid, but unless such sale by parcels in the aggregate shall exceed the amount of the sale in bulk the sale by bulk shall be held valid; and the plaintiff renewing his motion for the appointment of a receiver heretofore made herein and upon the same grounds as upon his former motion on file herein, the court, being fully advised in the premises, finds that the said real estate is probably insufficient to satisfy the plaintiff's claim set forth in the petition, and that the said property is in danger of suffering waste and deterioration in value from other causes; and it is therefore further ordered and decreed by the court that a receiver be appointed to take possession of the said real estate and care for, preserve, and rent out the same and receive and hold the rents and profits thereof, and John H. Newell, being a suitable person to act as such receiver, is hereby appointed by the court as such receiver to act in the premises as above directed, and it is ordered that he give an undertaking as such receiver in the amount of two thousand dollars, conditioned for the faithful discharge of his duties in the premises and the payment over of the amounts received by him of the rents and profits of the said lands; and it is, according to the order of the court in that behalf, ordered that the said receiver keep the residence or mansion-house on said lands insured for a proper amount, and that he be authorized to have any other buildings insured on said premises if it shall seem to him necessary and proper so to do.

And the said receiver is further authorized and ordered to permit Ellen Nash, the mother of defendants John A. Nash and Bessie B. Dupee, together with her family, to occupy the mansion-house on said lands, where she now resides, together with the yard and outbuildings connected therewith, until the sale shall take place herein, providing such occupation by her shall not seriously interfere with the proper care thereof or with the proper management of the residue of the said premises. If for any proper reason set forth above said receiver shall desire to obtain possession of said premises so occupied by the said Ellen Nash he may apply to the court to obtain possession thereof, and out of the proceeds of the rents and profits so received by him said receiver shall pay for such insurance as he shall take out as above directed and apply the residue to the payment of the taxes on said lands until the same are paid and hold the balance to await the order of the court upon distribution of the proceeds of the sale of said lands or such other order as the court may make in that behalf.

And thereupon came the defendant John A. Nash and prayed the allowance of an appeal to the next term of the Supreme Court of the United States, which appeal is allowed and bonds for costs fixed at $500.00; and it is ordered that the receiver above named keep possession of the said lands and collect the rents and profits thereof pending said appeal, and that the appointment of such receiver be and operate as a supersedeas bond pending said appeal,

and no order for the sale of said premises shall issue pending said appeal.

* * * * * * *

(Record, page 74.)

Afterwards, to wit, on the 11th day of December, 1890, a bond was filed herein, which reads and is in the words and figures following, to wit:

Know all men by these presents that we, John A. Nash, as principal, and D. S. Hounshell and Charles A. Dupee, as sureties, are held and firmly bound unto George W. Harshman in the full and just sum of five hundred dollars, to be paid to the said George W. Harshman, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of December, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of circuit court of the United States, northern dist. Ohio, western division, in a suit pending in said court between George W. Harshman, as co-complainant, and John A. Nash *et al.*, as respondents, a decree was rendered against the said John A. Nash, and the said John A. Nash having obtained allowance of an appeal to reverse the decree in the aforesaid suit and a citation directed to the said George W. Harshman citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the conditions of the above obligation is such that if the said John A. Nash shall prosecute this appeal to effect and answer all costs if he fail to make his plea good, then the obligation to be void; else to remain in full force and virtue.

JOHN A. NASH. [SEAL.]
D. S. HOUNSHELL. [SEAL.]
CHARLES A. DUPEE. [SEAL.]

Sealed and delivered in presence of—

JOHN C. LEE.

Approved by—

A. J. RICKS,
U. S. Dist. Judge.

Afterwards, to wit, on the same day, a justification was filed herein and reads and is as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Charles A. Dupee, being first duly sworn, on oath says that he is worth at least the sum of seventy-five thousand dollars in property exempt from execution over and above all his liabilities.

Chicago, Oct. 15, 1890.

CHARLES A. DUPEE.

The above affidavit was subscribed and sworn to by the said Charles A. Dupee, who is personally known to me, this 15th day of October, A. D. 1890.

Witness my hand and notarial seal.

FREDERICK G. O'CONNELL,
Notary Public. [SEAL.]

* * * * * * *

(Record, page 78.)

Deposition of John A. Nash, taken by and before me, the undersigned, a notary public in and for the county of Cook and State of Illinois, in pursuance of the notice which is hereto attached, in a cause pending in the circuit court of the United States for the northern district of Ohio, western division, wherein George W. Harshman is plaintiff and John A. Nash *et al.* are defendants, at the time and place specified in the annexed notice.

Present: David S. Hounshell, Esq., attorney for the defendants; no one present on behalf of the plaintiff.

JOHN A. NASH, one of the defendants in said cause, being produced as a witness and being by me first duly sworn, as hereinafter certified, testified as follows:

(Examined by Col. HOUNSHELL:)

Ques. 1. Where do you reside and what is your age?

Ans. In Chicago, Cook county, Illinois; my age is twenty-eight years.

Ques. 2. State if you executed and delivered to the plaintiff the note and mortgage sued on; and, if so, where they were, and also state if there was any other paper-writing signed by you and the plaintiff relating to the mortgaged lands and the time of payment of the money specified in the note and mortgage.

Ans. I did execute and deliver the note and mortgage to plaintiff at the law office of John M. Sweet, in Bellefontaine, Logan county, Ohio. There was an agreement relating to the sale of the land and the payment of the money signed by me and the plaintiff at the time the note and mortgage were delivered by me to the plaintiff.

Ques. 3. State the contents of said agreement above mentioned as to the time of the payment of the money and sale of the lands for the purpose of raising the money to pay off the note and mortgage sued on.

Ans. The agreement signed by us provided that I might sell the mortgage lands in such quantities to suit the purchasers on time, the purchaser paying one-fourth of the purchase-money down at the time of sale and securing the deferred payments by a lien on the land sold. The time given to purchasers required them to pay all the purchase-money for the land they bought in four years from the date of the note and mortgage. I had four years myself by the agreement to pay the plaintiff twenty-six thousand dollars, the amount I owed him, with eight per cent. interest. It was agreed between us that upon my turning over to the plaintiff the money received from the purchasers at the time of each sale and their obligations for the deferred payments secured by lien on property sold, as above mentioned, that the plaintiff would give me credit on my note for twenty-six thousand dollars for the proceeds of all sales made by me.

Ques. 4. What was done with the agreement? And state, also, who were to have duplicate copies of it, and how it happened that you did not get a copy or retain the original itself.

Ans. I gave the agreement to the plaintiff. We were both to have copies of the agreement. The reason I did not get a copy was this: The plaintiff and myself went up on the early morning train which passed West Liberty about four o'clock in the morning, and the delay after we got to Bellefontaine in transacting the business brought us so near the time of arrival of the south-bound train which the plaintiff wished to take to home near Dayton, Ohio, that we could not copy the agreement after recording the mortgage in time for the plaintiff to catch the train, so it was agreed between the plaintiff and myself when I delivered the agreement to him that he should send me a "copy of it by return mail." This he failed to do and I went down about ten days after to get a copy of the agreement and he declined to give me a copy, and I afterwards went down a second time and again asked him for a copy of said agreement, which he again refused to deliver.

Ques. 5. Had you at any time applications by persons wishing to purchase any of said property, and were you hindered and prevented making sales by reason of your inability to do so without this agreement authorizing you to make sales?

Ans. I was spoken to by quite a number of persons desiring to purchase, but, not having the agreement, could not consummate the sales.

Ques. 6. What was the mortgaged land worth per acre, on a general average, on such favorable terms of purchase as to time as was secured by said agreement?

Ans. It is worth eighty dollars per acre.

Ques. 7. What damages have you sustained or would you sustain in the event of a forced sale of these lands by reason of the plaintiff's refusal to deliver you a copy of the said agreement?

Ans. I would sustain the amount of damage that the property might sell for less than eighty dollars per acre, on the general average, with the cost of litigation added.

Ques. 8. Have you explained at any time to Mr. Dupee, to whom

you conveyed the property, the terms of said agreement as to sales and the time you had to pay off the note and mortgage?

Ans. Yes; I have.

Ques. 9. For what length of time did you borrow the twenty-six thousand dollars from the plaintiff?

Ans. For the period of four years, and the said agreement in the possession of the plaintiff shows that fact.

JOHN A. NASH.

Subscribed and sworn to before me this fourth day of June, A. D. 1890.

ARTHUR A. BLISS,
A Notary Public in and for the County of Cook,
in the State of Illinois.

STATE OF ILLINOIS, }
County of Cook, } ss:

I, Arthur A. Bliss, a notary public in and for said county, in the State aforesaid, do hereby certify that the above-named John A. Nash was by me first sworn to testify the truth, the whole truth, and nothing but the truth in relation to the matters in controversy in said cause, and that the deposition above described by him was reduced to writing by him in my presence and was subscribed by said John A. Nash in my presence, and was taken at the time and place in the annexed notice specified, and that I am not counsel, attorney, or relative of any party to said suit or otherwise interested in the event of the same.

In testimony whereof I have hereunto set my hand and official seal this fourth day of June, A. D. 1890.

ARTHUR A. BLISS,
[SEAL.] *A Notary Public in and for the County of Cook,*
in the State of Illinois.

Fees, $3.00; p'd by def'ts.

* * * * * * *

Office Supreme Court U. S.
FILED.
APR 17 1893
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CLERK.

957

CASE NO. 14,898.

SUPREME COURT OF THE UNITED STATES.

149 U.S. 263

JOHN A. NASH, Appellant,

VS.

GEORGE W. HARSHMAN, Appellee.

BRIEF FOR APPELLEE

On Motion to Dismiss and Affirm.

LOUIS D. JOHNSON,
Counsel for Appellee,

SUPREME COURT OF THE UNITED STATES.

JOHN A. NASH, Appellant,

VS.

GEORGE W. HARSHMAN, Appellee.

BRIEF FOR APPELLEE

On Motion to Dismiss and Affirm.

LOUIS D. JOHNSON,
Counsel for Appellee,

SUPREME COURT OF THE UNITED STATES.

JOHN A. NASH, Appellant,

vs.

GEORGE W. HARSHMAN, Appellee.

BRIEF FOR APPELLEE ON MOTION TO DISMISS AND AFFIRM.

FOR COPY OF MOTION SEE APPENDIX A.

STATEMENT.

This was originally a civil action brought in August 1889 under the Code of Civil Procedure of Ohio in the Court of Common Pleas of Logan County, by Geo. W. Harshman as plaintiff, asking personal judgment against John A. Nash on a note of $26,000, copied in the petition contained in the record herein, and setting up the execution of a mortgage by Nash to secure the same, alleging the conveyance of the mortgaged premises and that, on the day following the date of the note and mortgage, Nash conveyed the land to Chas. A. Dupee who with others was made a defendant. Nash and Dupee filed answers which are printed in the record and, after the cause was at issue, it was removed to the Circuit Court for the Northern District of Ohio under the local prejudice act. There the prayer for judgment against Nash was discarded, the Court heard the cause and rendered a decree for the sale of the lands and at the same time appointed a receiver to take possession of the prop-

erty pending the carrying of the decree into execution, for the reasons provided by the statutes of Ohio, referred to hereafter. Nash prayed the allowance of an appeal, which the Court granted and required security for costs in the sum of only $500, and further ordered that the appeal should operate as a supersedeas, and that the appointment of the receiver should take the place of security therefor.

Dupee the owner of the land signed this bond for costs as did also defendant's counsel. Dupee signed as surety and was required to justify as such, which he did. The questions made by this motion are as follows:

I. On the insufficiency of this security to give this Court jurisdiction, both because the very person against whom the decree is aimed assumes to be the security and also because the security required to be given, in the order of allowance of the appeal, is not such as the law requires, but on the contrary, the order assumes to dispense with such lawful security.

II. The insufficiency of this appeal because it was taken by Nash, against whom no relief was asked in the bill, as the same was treated and construed in the Circuit Court, and against whom no decree was made and because Dupee, whose rights alone were affected by it, is no party to it.

III. That the appeal is frivolous, the answer showing no color of defense to the bill, but showing affirmatively that none existed, and other matters showing the frivolous character of the appeal hereafter stated in detail.

From all of which it is claimed that this Court acquired no jurisdiction by the appeal but only such colorable jurisdiction as to warrant a dismissal and affirmance.

THE ERRORS complained of are sufficiently indicated in the above statement without repetition.

ARGUMENT.

There are three grounds upon which the motion is made and while it is probable that the Court would not entertain it upon the third ground alone (that the appeal is frivolous) which might ordinarily be regarded as more proper for determination at the final hearing as involving the merits of the case, yet the frivolous character of the appeal will be rendered apparent upon examining enough of the record to notice the other points raised by the motion, and I conceive that at any time the Court is advised, when a case is regularly before them at any stage, that an appeal is utterly groundless, they will embrace the first opportunity to do justice between the parties and at the same time rid the over-burdened docket of such case.

Rule 6, Sec. 5.

Motion to affirm will be granted if writ taken for delay only.

The S. C. Tryon 15; Otto 267.

FIRST BRANCH.

The first ground assigned for dismissing the appeal is upon two imperfections as follows, viz.:

I. For lack of sufficient legal surety.

II. Because the undertaking itself and the order requiring it given and approving it are not sufficient to give this Court jurisdiction of the appeal.

For Undertaking, see Printed Record Page 12.

I.

It is assumed that this appeal is taken by John A. Nash, one of the defendants below, a matter which will be considered under the second ground of the motion

See Printed Record, Page 11 near bottom.

And the surety is Charles A. Dupee, the other defendant.

See Appendix B.

Without pausing to cite authority I assume it to be the law that it is not sufficient for one of the parties against whom a decree is render-

ed to appeal therefrom and give as surety on the undertaking the other party affected, for this would simply amount to the allowance of the appeal without any undertaking as required by law or without any surety, which is the same thing in substance.

It is not an undertaking that is required but "good and sufficient security".

Revised Statutes of U. S. § 1000.

It must be taken before the Judge.

O'Reilly vs. Edrington, 96th, U. S. 724;
National Bank vs. Omaha, 96th U. S. 737.

This decree is for the sale of lands which all parties agree belong to Dupee and yet Dupee signs the undertaking as security.

Since printing this record, I notice that the name of appellant's counsel is also signed to the undertaking, but it is the bond in its entirety that is approved, and there is no presumption that the security is sufficient without Dupee's name, but the fact that the Court required Dupee to justify, by swearing to his solvency and sufficiency, raises the contrary presumption because, if the surety had been satisfactory without his name, such justification would not have been required, the above section not requiring more than one person as security.

The provisions of Sec. 1000 must be strictly complied with.

Seward vs. Cornean, 102, U. S. 161.
16 Howard 140.

II.

The bond is for costs only, the Court so ordering, and that the appointment of such receiver should stand instead of supersedeas bond.

Bottom of Page 11, Printed Record.

But the reason given for appointing the receiver is because "the real estate mortgaged is probably insufficient to satisfy the mortgage" and is in danger, etc.

Same page near top.

This is exactly the ground upon which the law of Ohio permits the appointment of a receiver in such cases.

Revised Statutes of Ohio, § 5587; ¶ 2.

In a foreclosure the giving of bond is not excused by appointment of receiver.

Stafford vs. Bank, 16 Howard 135-142.
Orchard vs. Hughes 1 Wallace 74.

In this case an undertaking of ten thousand dollars was required and the complaint was simply on account of insufficiency of amount. The bond must have been for supersedeas as well as costs. Therefore the case at bar presents stronger reasons why the bond is insufficient as the Court below by its order has assumed to excuse the giving of such security as the law requires and this is done as a part of the decision and order by which the appeal is allowed This I claim renders the allowance of the appeal invalid. It is an ineffectual attempt to appeal which does not go far enough to impose jurisdiction on this Court. If a Judge of the Circuit Court should assume to allow an appeal and in the same connection dispense with the giving of any security, undoubtedly his action would be simply a nullity and this Court would dismiss such attempted appeal; and the same thing would be true if a different kind of security from that provided by law be attempted to be taken, or security for a different purpose or object than the law requires and this I submit distinguishes the present case so as to exclude it from the operation of the last clause of the opinion of the Court in the case Stafford vs. Bank 17 Howard 280.

In that case security had been required and had been given in the manner and for the purpose provided by law, which gave this Court jurisdiction on appeal; in this, the order allowing the appeal assumes to dispense with the necessity of the security the law says must be given as a part of such allowance.

In that case it was held that appointment of a receiver could not help keep out such lawful security as to amount; in this the Court assumes to make such appointment a substitute for such lawful security and allow an appeal, which by its terms is a supersedeas.

SECOND BRANCH.

This appeal should have been taken by Chas. A. Dupee, or at any rate he should have been joined in it. He is really the party against whom the decree of the Court below was made so far as a decree of this

nature can be said to be *against a party*. Both should have become parties to this cause in this Court.

See Smyth vs. Strader, Pervine & Co., 12 Howard 327.

Davenport vs. Davenport, 16 Howard 144.

The proceeding was originally an action brought in a Court of Ohio and under its laws in which it is allowable to pray both for a personal judgment against the maker of a note and an order foreclosing a mortgage given to secure it. By removing the action to the Court of the United States its dual character had to be abandoned and it became, and was treated as, the ordinary foreclosure in equity—a proceeding *in rem* the prayer for judgment being rejected.

See opinion of Judge Ricks, Printed Record, page 7.

The learned Judge might have added to what he there said about the sufficiency of the pleadings that this cause having come to issue before removal, the pleadings are only subject to such objections as might have been urged in the State Court, no modifications being required or even permitted.

Merch. & Manf. Bank vs. Wheeler 13 Blatchf. 218.

It is apparent on this record that Dupee was the owner of the lands at the time of the bringing of the action. It is alleged in the petition or bill that Nash conveyed them to him on the day following the date of the mortgage.

Printed Record, page 2.

The Court finds it to have been conveyed to him on the same day the mortgage was actually executed.

Printed Record, page 8, below middle.

Also page 9, at bottom.

And this appellant also stated it in his own deposition.

Printed Record, Page 14, question 8 and answer.

Now this appellant was not even a necessary party to a bill to foreclose this mortgage though a *proper* party to the *action* brought in the State Court. He had parted with all estate and right in and to the land, and it was only necessary to cut off the right of Dupee, his grantee.

Nash was not "a necessary party to a complete determination or settlement of a question involved" in the bill.

See Revised Statutes of Ohio, Secs. 5006 and 5013.

Dupee could have made any defense to such bill as existed in favor of Nash before the conveyance from the latter to the former.

There has yet been no order made in this cause in any of its stages affecting any right of Nash. The only way any judgment can be obtained against him, which is the only remedy the appellee now has, is by bringing a personal suit against him. If it be argued that he is liable for the surplus due on this claim after the application of the property, the answer is, that there is no judgment or order against him yet, or in the decree appealed from, the order contained in the decree to that effect being merely a condition upon which an order of sale against the lands of Dupee will be withheld. And no order can be made against Nash hereafter for any defficiency except under the rule of Court, Equity rule 92, which I hold would not apply under the circumstances of this case, the suit as against Nash having been already virtually dismissed by this decree appealed from; but "sufficient unto the day is the evil thereof," if such decree for such possible surplus be hereafter made against Mr. Nash, he may then appeal from it.

See 3rd Sec. of Syllabus, Orchard vs. Hughes, 1 Wall. 74.

THIRD BRANCH.

This appeal is utterly frivolous, as was the defense sought to be made by the answer.

The defendant below admitted the making of the note and mortgage set up by the plaintiff, but claimed an extraneous and contemporaneous contract, whereby the time the note was to run was four years, instead of one year, as specified in the note itself.

Answer on page 4, Printed Record.

Now with reference to this claim it will be noticed that the note, a copy of which is set out in the petition or bill, provides for prompt payment of interest annually, with the accompanying provision, that any failure in that respect, should *ipso facto* render the whole amount due. This provision of the note is in no-wise attacked or changed by the al-

leged extraneous agreement, so that so far as that is concerned, the whole amount would still have been due long before bringing the action, which is shown to have been in August, 1889.

Again, it is claimed for this side agreement, that it reserved to Nash, the right to sell this land in parcels, and on time or otherwise, but that he could not do so *because Harshman would not give him a duplicate copy of that contract.*

Now, it is shown above that he did sell all the land *immediately*, and conveyed it to Dupee, and there is no averment anywhere in the record, that he made any attempt to put Dupee in his shoes as to this alleged contract. This, however, he could not have done, as he had already a full compliance with that part of the contract authorizing sale, by selling to Dupee himself. A demurrer would lie to this answer.

I invite a little attention to that part of the opinion of Judge Ricks on this particular point.

Record, pages 7 and 8.

The facts shown by this record are briefly as follows:

Five years ago, this appellant borrowed of my client on this land, all of the money that it took to pay for it and more*; that he only owned it a part of a day, only long enough to receive his deed, make this mortgage, and convey away the land; that not one cent of interest or taxes has ever been paid by either Nash or Dupee, or anyone; that they allowed the land to fall into a state of waste and decay, (page 11) and that they have been enabled to carry on such a high-handed outrage by the invention of the fairy story contained in this answer, removing the cause after issue, and appealing to this Court, with its over-crowded docket. It is at least an unusual instance of withholding from a plaintiff his right, by the use of the obstructing quality of the forms of the law and its unavoidable delay.

Respectfully submitted,

LOUIS D. JOHNSON.

* I observe now that the whole purchase price is not shown by this portion of the record to have been paid to the Commercial Bank out of this loan.

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT, v. THE ATCHISON, TOPEKA & SANTA FÉ R.R. CO. ET AL.	*No.* 1275.

MOTION TO DISMISS APPEAL.

Now come the appellees, by their counsel, and respectfully move this honorable Court that the appeal in the above-entitled cause be dismissed for want of jurisdiction.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellees.

STATEMENT.

May 22, 1889, complaint was filed before the Interstate Commerce Commission against the appellees by the Board of Trade of San Bernardino, California, alleging said companies' maintenance of freight rates discriminative against San Bernardino, and in violation of the Act of February 4, 1887, to regulate commerce (24 Stats. 379).

Upon hearing, order was entered by the Commission on July 19, 1890, requiring the appellees to change and modify such rates. The appellees failed to obey such order, whereupon the Interstate Commerce Commission commenced this proceeding to enforce such obedience in the U. S. Circuit Court for the Southern District of California, on May 1, 1891, pursuant to section 16 of the Interstate Commerce Act (amended Act of March 3, 1889, 25 Stats. 859). That Court decreed in favor of the appellees on April 25, 1892, on the sole ground that upon the proof presented the alleged unlawful discrimination in rates did not exist (50 *Fed. Rep. p.* 295; Trans. p. 202), and thereupon, on May 14, 1892 (Trans. p. 4163), the Commission appealed to this Court.

Such decision was rendered and this appeal was taken *after* the creation of the Circuit Courts of Appeals. The question is whether such direct appeal lies to this Court.

ARGUMENT.

Section 16 of the original Act of February 4, 1887, entitled "An Act to Regulate Commerce" (24 Stats., p. 379), and as amended by section 5 of the Act of March 3, 1889 (25 Stats., p. 859), provides a summary remedy on behalf of the Commission to enforce its orders by resort by peti-

tion to the U. S. Circuit Court of the district as sitting in equity, and in which the defendant carrier has its principal place of business or in which the violation or disobedience of such order occurs. The statute as thus amended further provides—

"When the subject in dispute shall be of the value of "two thousand dollars or more, either party to such pro- "ceeding before said Court may appeal to the Supreme "Court of the United States, under the same regulations "now provided by law in respect of security for such ap- "peal; but such appeal shall not operate to stay or "supersede the order of the Court or the execution of any "writ or process thereon; and such Court may, in every "such matter, order the payment of such costs and coun- "sel fees as shall be deemed reasonable."

The same section provides that if the matters involved require a jury trial under the Seventh Amendment to the Constitution, any company or person interested therein may, by summary petition, apply to such Circuit Court sitting as a court at law for such trial and enforcement of such order, and with the same right of appeal given to the Supreme Court in language precisely equivalent to foregoing, excepting only the omission of the provision that the appeal shall not stay or supersede the order of the Court or the execution of any writ or process thereon.

For the convenience of the Court those portions of the Circuit Courts of Appeals Act of March 3, 1891 (26 Stats. 826), in any wise pertinent to this question are here presented in full:

"SEC. 4. That no appeal, whether by writ of error or "otherwise, shall hereafter be taken or allowed from any "district court to the existing circuit courts, and no ap-

" pellate jurisdiction shall hereafter be exercised or al-
" lowed by said existing circuit courts, but all appeals by
" writ of error or otherwise, from said district courts shall
" only be subject to review in the Supreme Court of the
" United States or in the circuit court of appeals hereby
" established, as is hereinafter provided, and the review,
" by appeal, by writ of error, or otherwise, from the ex-
" isting circuit courts shall be had only in the Supreme
" Court of the United States or in the circuit courts of
" appeals hereby established according to the provisions
" of this act regulating the same.

" SEC. 5. That appeals or writs of error may be taken
" from the district courts or from the existing circuit
" courts direct to the Supreme Court in the following
" cases:

" In any case in which the jurisdiction of the court is
" in issue; in such cases the question of jurisdiction alone
" shall be certified to the Supreme Court from the court
" below for decision.

" From the final sentences and decrees in prize causes.

" In cases of conviction of a capital or otherwise infamous
" crime.

" In any case that involves the construction or applica-
" tion of the Constitution of the United States.

" In any case in which the constitutionality of any
" law of the United States, or the validity or construction
" of any treaty made under its authority, is drawn in ques-
" tion.

" In any case in which the constitution or law of a
" State is claimed to be in contravention of the Constitu-
" tion of the United States.

" Nothing in this act shall affect the jurisdiction of the
" Supreme Court in cases appealed from the highest court
" of a State, nor the construction of the statute providing
" for review of such cases.

" SEC. 6. That the circuit courts of appeals established
" by this act shall exercise appellate jurisdiction to
" review by appeal or by writ of error final decision in
" the district court and the existing circuit courts in all
" cases other than those provided for in the preceding

" section of this act, unless otherwise provided by law,
" and the judgments or decrees of the circuit courts of
" appeals shall be final in all cases in which the juris-
" diction is dependent entirely upon the opposite parties
" to the suit or controversy, being aliens and citizens of
" the United States or citizens of different States; also in
" all cases arising under the patent laws, under the reve-
" nue laws, and under the criminal laws and in admiralty
" cases, excepting that in every such subject within its
" appellate jurisdiction the circuit court of appeals at any
" time may certify to the Supreme Court of the United
" States any questions or propositions of law concerning
" which it desires the instruction of that court for its
" proper decision. And thereupon the Supreme Court
" may either give its instruction on the questions and
" propositions certified to it, which shall be binding upon
" the circuit courts of appeals in such case, or it may
" require that the whole record and cause may be sent
" up to it for its consideration, and thereupon shall decide
" the whole matter in controversy in the same manner as
" if it had been brought there for review by writ of error
" or appeal.

" And excepting also that in any such case as is herein-
" before made final in the circuit court of appeals it shall
" be competent for the Supreme Court to require, by *cer-*
" *tiorari* or otherwise, any such case to be certified to the
" Supreme Court for its review and determination with
" the same power and authority in the case as if it had
" been carried by appeal or writ of error to the Supreme
" Court.

" In all cases not hereinbefore in this section made
" final there shall be of right an appeal or writ of error or
" review of the case by the Supreme Court of the United
" States where the matter in controversy shall exceed one
" thousand dollars besides costs. But no such appeal
" shall be taken or writ of error sued out unless within
" one year after the entry of the order, judgment, or de-
" cree sought to be reviewed."

* * * * * * *

"SEC. 14. That section six hundred and ninety-one of "the Revised Statutes of the United States and section "three of an act entitled 'An act to facilitate the disposi- "'tion of cases in the Supreme Court, and for other pur- "'poses,' approved February sixteenth, eighteen hundred "and seventy-five, be, and the same are hereby repealed. "*And all acts and parts of acts relating to appeals or "writs of error inconsistent with the provisions for review "by appeals or writs of error in the preceding sections five "and six of this act are hereby repealed.*"

It is submitted that section 14, *supra*, is in language and effect a plain repeal of that portion of section 16 of the Interstate Commerce Act, *supra*, which provides for a direct appeal to the Supreme Court in cases arising thereunder. The provision of section 14 is sweeping. "*And* "*all Acts and parts of Acts*" cannot be fairly construed to *exclude* any previous Act which relates in whole or in part to the same subject. If doubt could exist upon any or all other parts of the Circuit Courts of Appeals Act, none can be indulged in face of the sweeping provision found in section 14.

Nor do any other provisions of the Circuit Courts of Appeals Act create or suggest a doubt. It is true that after section 5 has marshalled the cases in which *direct* resort may be had to the Supreme Court, section 6 provides for appeal or writ of error to the Circuit Court of Appeals "in all cases other than those provided for in the pre- "ceding section of this Act, *unless otherwise provided by* "*law;*" but this additional limitation is plainly meant to apply to those cases wherein the judgment or decree of the district or circuit Court is made final by the statute. For illustration, appeal in civil cases from the district to the circuit Court is limited to cases where the matter in dispute exceeds the sum or value of $50 (R. S., sec.

631–633), and hence no appeal lies in any case to the new Circuit Court of Appeals in cases involving less than that sum. So also the district courts have final jurisdiction in certain classes of inferior crimes, and in which no appeal from its judgment and sentence lay to the circuit Court. In all such cases the jurisdiction of the Circuit Court of Appeals was not enlarged over that formerly exercised by the Circuit Courts. The language of section 5, *supra*, "*unless otherwise provided by law*," is plainly a limitation upon the appellate authority of the Courts of Appeals, and does not create an exception on which to even suggest the continued right of *direct* appeal to the Supreme Court in cases arising under section 16 of the Interstate Commerce Act.

The purpose of the Circuit Court of Appeals Act is too well known to the Court to require extended comment. That the entire Federal appellate jurisdiction was thereby divided and made all embracing is expressly affirmed in *McLish* v. *Roff* (141 U. S. 661, 666).

Section 10 of the Interstate Commerce Act gives the injured party alternate right to resort to the Commission or to the District or Circuit Courts for redress. *Chicago & Northwestern Ry. Co.* v. *Osborne*, and *Same* v. *Junod* (146 U. S. 354), are instances where direct suit was brought in the Circuit Courts under this section, and taken thence to the Circuit Court of Appeals, whose action thereon this Court declined to review on petition for *certiorari*, because the judgments of reversal rendered by that Court therein were not final. The cases are cited as illustrating the suggestion that it cannot be logically held that suits under section 16 of the Interstate Commerce Act may be brought directly to this Court, while suits under section 10 thereof must be carried to the Circuit Courts of Appeals.

It is proper to add that the appellant has also taken seasonable appeal herein to the Circuit Court of Appeals for the Ninth Circuit, and such appeal is now pending therein.

Respectfully submitted.

GEO. R. PECK,
A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellees.

Office Supreme Court U. S.
FILED.
APR 24 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

NO. 1275.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs

THE ATCHISON, TOPEKA & SANTA FE RR. CO.
THE ATLANTIC & PACIFIC RR. CO.
THE BURLINGTON & MISSOURI RIVER RR CO.
THE CALIFORNIA CENTRAL RY CO.
THE CALIFORNIA SOUTHERN RR. CO.
THE CHICAGO, KANSAS & NEBRASKA RY. CO.
THE MISSOURI PACIFIC RY. CO.
THE ST. LOUIS & SAN FRANCISCO RY. CO.
THE SOUTHERN CALIFORNIA RR. CO.

BRIEF OF APPELLANT

ON

MOTION TO DISMISS APPEAL.

W. A. DAY,
For Appellant.

WASHINGTON, D. C.:
NATIONAL ECONOMIST PUBLISHING CO.,
1893.

Supreme Court of the United States

OCTOBER TERM, 1892.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE ATCHISON, TOPEKA & SANTA FE RR. CO., THE ATLANTIC AND PACIFIC RR. CO., THE BURLINGTON & MISSOURI RIVER RR. CO., THE CALIFORNIA CENTRAL RY. CO., THE CALIFORNIA SOUTHERN RR. CO., THE CHICAGO, KANSAS & NEBRASKA RY. CO., THE MISSOURI PACIFIC RY. CO., THE ST. LOUIS & SAN FRANCISCO RY. CO., THE SOUTHERN CALIFORNIA RR. CO.

No. 1275.

Appeal from the United States Circuit Court for the Southern District of California.

Brief for Appellant on Motion to Dismiss Appeal.

The question in this case is whether the Act of March 3, 1891, (by which Act the United States Circuit Court of Appeals was established) repealed those clauses of the Act to regulate commerce which relate

to appeals from the Circuit Court of the United States in cases prosecuted under the Interstate Commerce Act.

The Act of March 3, 1891, established a Court, which is, in fact, an intermediate Court of Appeals. In the greater number of cases which will go to this Court of Appeals, there will be a possible second appeal to the Supreme Court of the United States.

The provisions of this Act relating to the point in controversy are quoted at length in the defendant's brief.

I.

A statute can be repealed only by express provision of a subsequent law, or by necessary implication. To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together, or be consistently reconciled.

Cool *vs.* Smith, 1 Black., 459.
Wood *vs.* United States, 16 Peters, 342.
Hartford *vs.* United States, 8 Cranch, 109.

The more natural, if not necessary, inference in all such cases, is that the legislature intends the new law to be auxiliary to, and in aid of, the purposes of the old law. There should, therefore, be a manifest and total repugnancy in the provisions of the new law to lead to the conclusion that the latter law abrogated and was designed to abrogate the former.

United States *vs.* Case, etc., 1 Paine, 400.

It is not contended, however, by the defendants

that there is a repeal of these clauses of the Interstate Commerce Act by implication, but they rely wholly on the words occurring in section 14:

> "And all acts and parts of acts, relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections 5 and 6 of this act, are hereby repealed."

Instances illustrating the point that a subsequent general statute, containing repealing words sufficiently comprehensive to embrace literally a prior special law, does not necessarily repeal the prior law, may be found in Story's case, Dyer, 298 b.; Foster's case, 11 Coke, 63 A, *et seq.*; Goldson *vs.* Buck, 15 East, 377.

In 35 Henry VIII, Ch. 2, a law was enacted providing for the summary trial and punishment for those apprehended of treason beyond seas. By the 1 and 2, Philip and Mary, Ch. 10, it was provided that all trials for treason should "be according to the course of the common law, *and not otherwise.*" In Story's case it was contended that the act of 1 and 2 Philip and Mary repealed the act of 35 Henry VIII, but the Court of King's Bench held that the subsequent act could be reconciled with the former, and did not repeal it, notwithstanding the negative words, "and not otherwise." It is submitted that the repealing words of the statute of 1 and 2 Philip and Mary were quite as comprehensive as the words in the statute under discussion, and that the reasoning which underlies the decision in Story's case sustains the contention that the provision in the act to regu-

late commerce, respecting appeals to the Supreme Court, is unaffected by the act of March 3, 1891. In the 35 Henry VIII, and in the act to regulate commerce special remedies were provided for public grievances which had become unendurable. In each Act special summary proceedure was provided, because it was believed that the public interests involved were of too grave a nature to wait on the ordinary procedure which was inadequate to afford the proper and speedy relief demanded by matters of such great public concern.

The Circuit Court of Appeals Act treats of the general subject of appeals, and specifically repeals section 691 of the Judiciary Act, and section 3 of the Act of 1875. The two sections thus repealed were the general regulating laws respecting appeals to this Court. The provision of the act to regulate commerce now under consideration was excepted out of the operation of those sections, just as the trials for treason beyond seas were excepted out of the common case of trials for treason. And as the subsequent legislation in England, purporting to regulate all trials for treason, was held not to apply to the special case provided for in the Act of Henry VIII, so should our subsequent legislation regulating appeals be held not to apply to the exceptional case of the act to regulate commerce.

II.

It is a general principle of construction, and one strictly applied in the case of the interpretation of statutes, that meaning and force should be given to

every part of a written instrument, and that no two phrases therein should be considered inconsistent unless they are totally repugnant to each other.

The general scope of the act creating the Circuit Court of Appeals (Act of March 3, 1891), is to take away a direct appeal from the District and Circuit Courts to the Supreme Court, and to confer jurisdiction in regard to appeals on the new Court of Appeals in all cases, except such as are excepted by the provisions of the act itself.

The exceptions are two-fold:

1. Those enumerated in section 5.

2. Those included in the phrase (occurring in section 6), "unless otherwise provided by law."

The clause in which this phrase is found reads as follows:

> "The Circuit Court of Appeals established by the Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District and Circuit Courts in all cases other than those provided for in the preceding section of this act, *unless otherwise provided by law.*"

The statute evidently refers to a class of cases other than those mentioned in section 5, else, the final qualifying clause, "unless otherwise provided by law," would seem to be wholly without force or meaning. This view is surely in harmony with the intent and spirit of the law; for, where an act contains certain express exceptions there is certainly nothing inconsistent or repugnant in a general provision creating other exceptions; particularly where such exceptions

are based on the same grounds of public policy as those expressly mentioned. Nor does the phrase under consideration in any way conflict with the words of the repealing clause of the act, inasmuch as that clause does not attempt to repeal the clause, "unless otherwise provided by law;" it only repeals such acts and parts of acts as are inconsistent with sections 5 and 6 of the act, and this last-named clause is one of the express provisions of section 6. Therefore, upon cases coming within this proviso the general repealing clause has no operation, and with reference to such cases it may be eliminated from the discussion.

In this view the real question on which the whole matter hinges is, what is the true meaning of the words, "or otherwise provided by law," in the connection in which they occur in the statute.

Though the phrase presents certain difficulties of interpretation, it is plain that its meaning does not extend to regular and ordinary cases where an appeal was previously allowed by law from the decisions of the District and Circuit Courts to the Supreme Court. Such a meaning would be clearly repugnant to the whole intent of the act, and these five words would completely nullify the purpose for which the act was passed. They must, therefore, be restricted in their meaning to extraordinary cases where a direct appeal to the Supreme Court is expressly provided by law, and where some useful public purpose is subserved thereby, as well as to those cases where the law gives no right of appeal whatever. The other construction of this phrase, namely, that taken in

the case of Lau Ow Bew, 144 United States, 47, where the point was neither in issue nor argued by counsel, refers the clause to contemporaneous or future legislation; but it is respectfully submitted that it is very unusual for a vague and general clause of this kind to be inserted simply with reference to legislation that may hereafter be enacted, and that such an interpretation adds little, if any, force to the act, while it introduces into it a new element of difficulty; for, if this is the true construction, the act creates a right of appeal in cases when the amount in controversy is under $50, in which the law previously denied an appeal even to the Circuit Court. Moreover, future legislation can repeal the law only by express words to that effect, or by necessary implication, and it is difficult to see in either case how the five casual words referred to above could have any effect to prevent or restrict a repeal. The act could be repealed, it would seem, as easily with them as without them.

III.

The remaining question is, whether the case at bar presents such extraordinary features as fairly bring it within the class of cases to which the exception contained in the words, "or otherwise provided by law," was intended to apply.

The Act creating the Interstate Commerce Commission is one of peculiar and unusual character, and the right of direct appeal to the Supreme Court of the United States given therein differs materially from the right of appeal conferred in ordinary cases,

because the right of appeal in the latter instance is general and applies to comprehensive classes of cases, whereas this right is a special privilege conferred on the Commission for the purpose of promoting the public inter-est. The Commission is a special creation of the United States, called into being by Congress for the purpose of doing certain public acts. The sovereign power, or the United States itself, is acting through the Commission, and the right of appeal in this case is analogous to a similar right reserved to the United States, in case it were a party to the litigation; and it is submitted that, in this instance, the United States practically is a a party. This view certainly gives to the present case a very exceptional and extraordinary character, and widely removes it from the general run of cases where a controversy arises between private parties. Moreover, the whole spirit of the Interstate Commerce Act shows that it was the intention of Congress that the proceedings under it should be of a summary character, and that in disputed cases an authoritative and final decision should be reached with the utmost practicable dispatch.

The act to regulate commerce was, so far as the Federal Government is concerned, legislation in a new field. Its purpose was to carry out a great public policy. For that purpose it created an administrative board charged with many duties other than the duty of deciding (in the first instance) disputes between citizens and carriers. The ultimate regulation of commerce contemplated by the act rests with the courts, and will follow from the decisions of the courts in

important cases, most of which will be presented by the Commission.

The Commission is therefore made an intermediary between the people, and the courts, having for one of its most important functions the preparation of cases, (which involve interests far wider than the interests of the particular litigants) in such shape as will insure the consideration by the Court of all the interests involved. A decision in a particular case in a Circuit Court of the United States for a particular district may affect the interests of many citizens in the most distant parts of the country.

It was, therefore, desirable not only that there should be a body of experts to frame cases for the courts, but also that the procedure should lead to a final authoritative decision as speedily as possible. For this reason, the Commission was not limited in its right of appeal from the Circuit Courts in the same manner or to the same extent, as private citizens. The act to regulate commerce expressly prescribes an unusual mode of proceedure to secure this end, and the Commission stands before the Courts in a position quite different from that of an ordinary litigant.

In view then of the great public importance and the wide effect upon commerce of the decisions of the courts in cases arising under the act to regulate commerce, Congress made these special provisions in that act for summary procedure and easy access to the courts of first instance, and for direct appeal to the Supreme Court of the United States.

It may, therefore, be fairly contended that it was for